IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ANTHONY CARROLL ARZAGA,
Petitioner.

No. 2 CA-CR 2020-0029-PR
Filed July 30, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Pinal County
No. S1100CR201401562
The Honorable Kevin D. White, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Thomas C. McDermott, Appellate Bureau Chief, Florence
Counsel for Respondent

Law Offices of Jeffrey D. Bartolino, Tucson
By Jeffrey D. Bartolino
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 Petitioner Anthony Arzaga seeks review of the trial court's ruling dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.[1] We will not disturb that ruling unless the court has abused its discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17 (2006). Arzaga has not met his burden of establishing such abuse here.

¶2 After a jury trial, Arzaga was convicted of leaving the scene of a fatal accident and two counts of driving on a revoked license. With regard to leaving the scene, the jury made a finding that the state had not proven beyond a reasonable doubt that Arzaga caused the accident. *See* A.R.S. § 28-661(B) (leaving scene of fatal accident is class three felony, unless driver caused accident, in which case it is class two felony). However, during the aggravation phase of trial, the jury found the state had established that "[t]he victim or, if the victim has died as a result of the conduct of the defendant, the victim's immediate family suffered physical, emotional or financial harm." *See* A.R.S. § 13-701(D)(9). The trial court found Arzaga had two historical prior felony convictions and sentenced him as a repetitive offender to a slightly aggravated thirteen-year prison term for leaving the scene and to time served for the two counts of driving on a revoked license. This court affirmed Arzaga's convictions and sentences on appeal. *State v. Arzaga*, No. 2 CA-CR 2016-0399 (Ariz. App. Nov. 6, 2017) (mem. decision).

[1] Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). Because it is neither infeasible nor works an injustice here, "we cite to and apply the current version of the rules." *State v. Mendoza*, No. 2 CA-CR 2019-0281-PR, n.1, 2020 WL 3055826 (Ariz. Ct. App. June 9, 2020) ("amendments apply to all cases pending on the effective date unless a court determines that 'applying the rule or amendment would be infeasible or work an injustice'" (quoting Ariz. Sup. Ct. Order R-19-0012)).

¶3 Arzaga initiated a proceeding for post-conviction relief, and the trial court appointed Rule 32 counsel. Appointed counsel filed a notice stating she had reviewed the record but had been unable to identify any colorable claims to raise in a Rule 32 petition and requesting an extension of time for Arzaga to file a pro se petition. Thereafter, Arzaga retained counsel, who filed a Rule 32 petition challenging the validity of the § 13-701(D)(9) aggravating factor. He argued there was insufficient evidence to support the jury's finding, during the aggravation phase, that "if the victim has died as a result of the conduct of the defendant, the victim's immediate family suffered physical, emotional or financial harm" because, during the guilt phase, the jury had not found Arzaga "caused the accident." He also argued that the jury had not been properly instructed regarding the aggravating factor and that his trial and appellate counsel had been ineffective in failing to raise these issues.

¶4 The trial court summarily dismissed the petition. It explained Arzaga had failed to present a material issue of fact or law entitling him to relief because he had two prior felony convictions that qualified not only as historical prior felony convictions for enhancement purposes but also as a statutory aggravating factor under § 13-701(D)(11). And, the court noted, the record established that it had considered the prior convictions as an aggravating circumstance. The court further observed that it had considered the "substantial additional emotional harm" suffered by the victims' immediate family members based on Arzaga "le[aving] their loved ones dying on the roadside without providing reasonable assistance, comfort or aid." "Having found the aggravating factor[] of two prior felony convictions," the court determined it was "of no consequence whether the emotional harm suffered by the family of the victims qualifie[d] as a statutory aggravating factor" under § 13-701(D)(9) because "the emotional harm suffered by the family . . . qualifie[d] as an aggravating circumstance under . . . the 'catch-all' provision" of § 13-701(D)(27).[2] Accordingly, the court concluded that the sentence would "be the same, even if [Arzaga were] correct that the statutory aggravating factor found by the jury [was] technically inapplicable when applied to the offense at issue." The court further noted that, because "the aggravated sentence was lawful," it was not addressing Arzaga's claims of ineffective assistance of counsel or the state's claims of preclusion. This petition for review followed.

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[2]Section 13-701(D)(27) provides that the court may consider "[a]ny other factor that the state alleges is relevant to the defendant's character or background or to the nature or circumstances of the crime."

¶5 If the trial court determines that no claim raised in a petition for post-conviction relief "presents a material issue of fact or law that would entitle the defendant to relief," the court must summarily dismiss the petition. Ariz. R. Crim. P. 32.11(a). Stated differently, to avoid summary dismissal, a defendant must establish a colorable claim—that is, a claim which, if the defendant's allegations are true, might have changed the verdict or sentence. *State v. Speers*, 238 Ariz. 423, ¶ 9 (App. 2015).

¶6 On review, Arzaga challenges the trial court's determination that, assuming the jury's finding of the aggravating factor could not have been considered under § 13-701(D)(9), it could have been considered under § 13-701(D)(27). He maintains that the court "should not be able to thwart legislative intent by slicing an enumerated factor into smaller pieces" for consideration under the catch-all factor. Arzaga further contends that he was not afforded notice of any § 13-701(D)(27) aggravator. And he maintains the court's "finding" of "substantial additional emotional harm" is "patently vague" and lacks a sufficient "legal and factual basis."

¶7 "The Sixth Amendment requires that a jury find beyond a reasonable doubt, or a defendant admit, any fact (other than a prior conviction) necessary to establish the range within which a judge may sentence the defendant." *State v. Martinez*, 210 Ariz. 578, ¶ 26 (2005). Thus, a trial court may use the catch-all factor of § 13-701(D)(27) "to impose a sentence up to the statutory maximum as long as a properly found specifically enumerated aggravating factor made the defendant eligible for a sentence greater than the presumptive." *State v. Bonfiglio*, 231 Ariz. 371, ¶ 10 (2013). A prior felony conviction is a specifically enumerated aggravator under § 13-701(D)(7) that can be found by the trial court, *see id.* ¶¶ 11, 13, and will expose a defendant to an aggravated sentence, *see State v. Carreon*, 211 Ariz. 32, ¶¶ 6-7 (2005); *see also Martinez*, 210 Ariz. 578, ¶ 21 (finding of a "single aggravating factor establishes the facts legally essential to expose the defendant" to an aggravated sentence).

¶8 Here, the trial court correctly determined that, even assuming the jury finding under § 13-701(D)(7) was somehow improper, because it found Arzaga had two prior felony convictions—a statutory aggravator under § 13-701(D)(11)—it could rely on the emotional harm suffered by the victims' families as an aggravating circumstance under § 13-701(D)(27).[3]

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[3]Arzaga's claims that there was insufficient evidence to support the aggravating factor because the jury had previously found he had not caused the accident and that the jury was improperly instructed seem to be based on Rule 32.1(a) and, as such, are precluded as "waived at trial or on appeal."

See Bonfiglio, 231 Ariz. 371, ¶ 11 (trial court may use prior convictions to enhance and aggravate sentence; after finding of prior convictions, trial court can also rely on catch-all factor). Although Arzaga argues that the catch-all provision of § 13-701(D)(27) "authorizes consideration only of other subjects . . . that are not addressed in the enumerated factors," he cites no authority for this proposition. Indeed, by using such broad language in § 13-701(D)(27), our legislature "has granted wide discretion to trial courts in determining what is an appropriate aggravating circumstance." *State v. Elliget*, 177 Ariz. 32, 36 (App. 1993).

¶9 Moreover, Arzaga had notice that the state intended to use the emotional harm of the victims' families as an aggravating circumstance. As the trial court pointed out, the state's allegation of aggravating circumstances, filed six days before trial, stated that "[t]he offense(s) caused physical, emotional or financial harm to the victim(s) and the victims' immediate family." Although the notice cited § 13-701(D)(9) rather than § 13-701(D)(27), Arzaga was aware of the substance of the allegation. *See State v. Benak*, 199 Ariz. 333, ¶ 16 (App. 2001) ("Notice . . . must be such that the defendant is not 'misled, surprised or deceived in any way by the allegations.'" (quoting *State v. Bayliss,* 146 Ariz. 218, 219 (App. 1985))). As Arzaga recognizes, the purpose of notice is to allow the defendant an opportunity to prepare and defend, *see State v. Scott*, 177 Ariz. 131, 141-42 (1993), but he does not suggest that he was unable to do so here.

¶10 Finally, we are unpersuaded by Arzaga's argument that the trial court's "finding" of "substantial additional emotional harm" is "patently vague" and lacks a sufficient "legal and factual basis." Although the catch-all factor of § 13-701(D)(27) has been described as "patently vague," Arzaga misapplies that language here. *See, e.g.*, *State v. Schmidt*, 220 Ariz. 563, ¶ 9 (2009). Our supreme court has explained that there is "an important difference between a trial court's using a catch-all aggravator to increase a defendant's maximum potential sentence versus the court's considering factors embraced by a catch-all in imposing a sentence within a properly determined maximum range." *Id.* ¶ 11. When at least one of the statutory aggravators are found, thereby allowing imposition of an aggravated sentence, "the 'elements' of the aggravated offense will have been identified with sufficient clarity to satisfy due process," and

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Ariz. R. Crim. P. 32.2(a)(3); *see also State v. Botello-Rangel*, 248 Ariz. 429, ¶ 17 (App. 2020) (we must affirm trial court's ruling if legally correct for any reason). However, to the extent his arguments could be construed as falling under Rule 32.1(c), we consider the trial court's conclusion.

"[s]ubsequent reliance on other factors embraced by a catch-all provision to justify a sentence up to the statutory maximum comports with the traditional discretionary role afforded judges in sentencing." *Id.*

¶11 Here, unlike in *State v. Price*, 217 Ariz. 182, ¶¶ 16-17 (2007), upon which Arzaga relies, the trial court expressly found that Arzaga had two prior felony convictions that qualified as an aggravating circumstance under § 13-701(D)(11).[4] Any concerns with § 13-701(D)(27) being "patently vague" insofar as it was the sole established aggravator were therefore allayed. *See Schmidt*, 220 Ariz. 563, ¶ 11.

¶12 Moreover, the family members in this case effectively articulated how Arzaga's leaving the scene had affected them, separate and apart from the accident and the victims' deaths. For example, when the prosecutor asked one of the victim's daughters how Arzaga's conduct in fleeing the scene had affected her, she responded:

> It was baffling. I don't understand the lack of humanity and compassion to do that to someone. I mean, I understand, this wasn't a malicious act, he didn't try that day to run down my family, but . . . I can't . . . understand a dog or a duck or a bird or anything and not stopping to render aid.
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> And to do what he did that day, I mean, I feel I can't forget that right now. I can't. And you know, I know he has a family, too, but just won't do that to somebody, you do what you can. You own up to the mistake that you make. And then you can be forgiven.

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[4]To the extent Arzaga contends the trial court did not make specific findings concerning the weight it was giving the prior felony convictions as an aggravating circumstance, such specificity was not required. *See State v. Harrison*, 195 Ariz. 1, ¶ 12 (1999) (formal findings not required, but court must articulate factors considered to be aggravating or mitigating and explain how factors led to sentenced imposed). The court stated it was considering the "nature and circumstances" of the convictions, balanced with the fact that they had already been used as enhancement.

¶13 Because Arzaga failed to establish that his sentence might have been different, the trial court did not abuse its discretion in summarily dismissing his petition.[5] *See Bennett*, 213 Ariz. 562, ¶ 17. Accordingly, we grant review but deny relief.

[5]Because Arzaga offers no separate argument concerning his claim of ineffective assistance of counsel, we do not address it. *See State v. Runningeagle*, 176 Ariz. 59, 63 (1993) (to establish claim of ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that the deficient performance caused prejudice).